VERNER·LIIPFERT
BERNHARD·McPHERSON AND HAND
CHARTERED

901 - 15TH STREET, N.W.
WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

RECEIVED

MAY 11 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL
(202) 371-6206

May 11, 2001

VIA HAND DELIVERY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Reply Comments of Non-MVPD Owned Programming Networks in CS Docket No. 01-07

Dear Ms. Salas:

Enclosed for filing please find the original and nine (9) copies of the Reply Comments of Non-MVPD Owned Programming Networks in the above-referenced docket.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Lawrence R. Sidman

Lawrence R. Sidman

Enclosures

No. of Copies rec'd 0+9
List ABCDE

RECEIVED

MAY 11 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Nondiscrimination in the Distribution of	)	**CS Docket No. 01-7**
Interactive Television Services Over Cable	)	

REPLY COMMENTS OF
NON-MVPD OWNED PROGRAMMING NETWORKS

Lawrence R. Sidman
Lawrence Duncan, III
Neil Fried
VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHTD.
901 15th Street, NW
Suite 700
Washington, DC 20005

(202) 371-6206

Counsel for Non-MVPD Owned
Programming Networks

May 11, 2001

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Nondiscrimination in the Distribution of Interactive Television Services Over Cable	))	**CS Docket No. 01-7**

REPLY COMMENTS OF NON-MVPD OWNED PROGRAMMING NETWORKS

I. Introduction and Executive Summary

In an effort to prevent further consideration of significant questions regarding the continued development of Interactive Television (ITV), opponents of nondiscrimination safeguards paint an inaccurate picture of both the ITV landscape and the safeguards that the Non-MVPD Owned Programming Networks seek.[1] Those opposed to a Notice of Proposed Rulemaking (NPRM) argue that ITV services are too nascent to warrant a Commission proceeding, downplay the incentive and ability of vertically integrated broadband distribution providers with market power to discriminate against unaffiliated ITV content, argue that nondiscrimination safeguards would discourage broadband investment, and misinterpret the enforcement-based nondiscrimination safeguards that the Non-MVPD Owned Programming Networks actually seek as open-access, must-carry, and common-carriage obligations. The Non-MVPD Owned Programming Networks' Comments and these Reply Comments, as supplemented by the attached economic analysis of Mr. J. Gregory Sidak and Dr. Hal J. Singer, demonstrate otherwise.

---

[1] "Non-MVPD Owned Programming Networks" filing these Reply Comments are: The Walt Disney Company, USA Networks, Inc., and Univision Communications Inc. Viacom is filing separately.

ITV already exists. As the Non-MVPD Owned Programming Networks explained in their Comments in this proceeding, consumers currently enjoy the benefits of interactivity in today's narrowband, two-screen world. For the moment, consumers watching a television program can obtain nondiscriminatory access to the enhanced content of their choice by signing on to the Internet over their computers. They can do so because the Internet currently rides on the open, narrowband telecommunications network. In fact, nondiscrimination safeguards in Title II of the Communications Act that apply to the narrowband platform played a little heralded but absolutely crucial role in creating the network effects that are largely responsible for the tremendous growth we have seen in the Internet.

We have reached the age of convergence, however, and the narrowband, two-screen world is shifting toward a broadband, single-screen one. The infrastructure necessary to accommodate that broadband, single-screen ITV world also already exists. Cable operators have spent billions of dollars to upgrade their networks, deploy set-top boxes, and install software to offer two-way, enhanced video programming over a single screen. And they will continue to make such investments to provide services such as broadband Internet access, digital cable, and video-on-demand (VOD) in addition to other ITV services. Thus, there is no risk that nondiscrimination safeguards will somehow deter broadband deployment.

The real question is whether the absence of nondiscrimination safeguards will limit consumers' access to broadband ITV and discourage unaffiliated programmers from investing in ITV content. True, two-way, enhanced video services will travel to the television over the broadband network using a set-top box that incorporates broadband modem functionality. Broadband distribution providers are poised to operate that ITV infrastructure under the same closed model that led Congress to pass the 1992 Cable Act.

At the moment, nothing clearly and effectively prevents vertically integrated broadband distribution providers with market power from denying consumers access to unaffiliated ITV content—such as by discriminatorily stripping triggers or blocking the return path—even when the providers have charged those consumers for both video and broadband modem service. That is why the Non-MVPD Owned Programming Networks filing these Reply Comments and other interested parties sent an *ex parte* letter to the Commission and the parties that filed comments in this proceeding, asking the parties to address in their reply comments whether consumers that pay their multichannel video distribution provider for both television and broadband Internet service will be able to access, and conduct business with, any site of their choice, including when prompted by "triggers" embedded in their television service.

The Non-MVPD Owned Programming Networks, and others, have already invested millions of dollars into ITV content in the narrowband, two-screen world and are beginning to pursue broadband, one-screen forms of ITV. What is at stake in this proceeding is whether the closed nature of the broadband platform will stifle that investment, hinder competition, and deny consumers access to advanced and diverse forms of ITV. As Mr. Sidak and Dr. Singer explain, vertically integrated broadband distribution providers with market power have an economic incentive to discriminate against unaffiliated content providers in certain circumstances.[2] By the FCC's own account, cable operators serve the lion's share of video programming viewers. In light of cable operators' market power and the technological advantages they enjoy in the distribution of broadband content such as ITV, Mr. Sidak and Dr. Singer conclude that today's

---

[2] *See* Attachment A at ¶¶ 26-34, 58.

market conditions give cable operators both the incentive and the ability to discriminate against unaffiliated content.[3]

Mr. Sidak and Dr. Singer also demonstrate that such discrimination has a very real cost: it discourages unaffiliated content providers from investing in ITV programming and drives competing, unaffiliated ITV distribution providers out of the market, leaving consumers with fewer choices at higher prices.[4] Mr. Sidak and Dr. Singer conclude that it is important for the Commission to continue its proceeding to determine whether discrimination by vertically integrated broadband distribution providers against unaffiliated ITV content has a sufficiently offsetting benefit.[5] The Non-MVPD Owned Programming Networks submit that it has no such benefit.

Consequently, the Non-MVPD Owned Programming Networks respectfully request that the Commission issue an NPRM that contemplates nondiscrimination safeguards. Such safeguards would take the form of a technology-neutral enforcement mechanism designed to counter the incentive and ability that vertically integrated broadband distribution providers with market power have to discriminate against unaffiliated ITV content providers. Such an enforcement mechanism would not impose any new open-access, must-carry, or common-carriage requirement on cable operators or any other broadband distribution provider. First, the safeguards would apply only when a vertically integrated broadband distribution provider with market power has already entered into an agreement to carry the underlying programming of an unaffiliated programming provider. Thus, "free riding" is not an issue here. Second, the safeguards would apply only if the vertically integrated distribution provider was already

---

[3] *See id.* at ¶¶ 24, 35-48.

[4] *See id.* at ¶¶ 7, 25-33, 42-45, 49-56.

[5] *See id.* at ¶¶ 29, 48, 65-66.

distributing ITV content to its customers. Third, the safeguards only would prevent the distribution provider from discriminating between the unaffiliated ITV content and the affiliated ITV content.

Such an enforcement mechanism would encourage investment by unaffiliated ITV content providers and would ensure that consumers benefit from diverse content and competition in ITV services. The safeguards would be consistent with FCC precedent and authority, as well as the First Amendment, and would encourage investment in and competition for broadband services and ITV.

II. ITV Services Are Not Too Nascent to Be the Focus of a Commission Rulemaking Proceeding

A. ITV Infrastructure Is in Place and Service Is Available

Forms of narrowband, two-screen ITV exist in the market today, and broadband, single-screen varieties are also starting to reach consumers, as the Non-MVPD Owned Programming Networks described in their Comments.[6] Even opponents of an NPRM in this proceeding agree with this fundamental fact, explaining that "ITV today encompasses a variety of features—including electronic programming guides ('EPGs'), enhanced television, 't-commerce,' email, chat rooms, video on demand ('VOD'), Internet access, and digital video recording—incorporated into an increasingly diverse number of packages."[7] Consumers not only recognize these services, they can already experience them at home.

Statements—as well as investments—by broadband distribution providers outside the context of this proceeding prove conclusively ever increasing levels of broadband ITV activity

[6] *See* Non-MVPD Owned Programming Networks Comments at 3-6.

[7] AOL Time Warner Comments at 4-5. *Accord* ALTV Comments at 5-6; Canal+ Comments at 3, 11-13, 16-23, 26-28; NAB Comments at 5-6; OpenTV Comments at 3.

and confirm that broadband ITV infrastructure is already in place. As of December 31, 2000, "over 75% of AT&T Broadband's cable television systems had bandwidth capacities of at least 550 megahertz, with the majority of the network upgraded to 750 megahertz"[8] to meet the capacity needs for an array of digital services including ITV. By the end of 2002, 93% of Charter's customers will be served by systems with bandwidth of 550 megahertz or more.[9] This system upgrade will be complemented by "the roll-out of [Charter's] advanced services, which [Charter] believe[s] will serve as the platform for interactive and other advanced services."[10] The record shows that "nearly 70% of [Charter's] customers are served by systems that are newly upgraded and capable of providing digital video, high-speed Internet access <u>and other exciting interactive services</u>."[11] Charter already provides "interactive programming using technology developed by Wink Communications, Inc."[12]

Likewise, AOL Time Warner has launched AOLTV, an interactive television service, and it has embarked on an "aggressive roll-out of digital cable service in its cable systems" that enables customers through digital set-top boxes to receive "a digital programming tier with the potential for more than 100 networks, 40 CD-quality music services, more pay-per-view options, more channels of multiplexed premium services, a digital interactive programming guide, and

---

[8] AT&T Corp. 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission.

[9] Charter Communications Inc. 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission, at 4.

[10] *Id.*

[11] Jerry Kent, Charter President & CEO, *Cable and Video: Competitive Choices, Prepared Testimony Before the Senate Subcomm. On Antitrust, Business Rights and Competition, Senate Comm. On the Judiciary*, 107th Cong., at 2 (April 4, 2001) (emphasis added). *See also id.* at 3 (stating that using its new capacity, Charter can provide its customers with interactive services such as high-speed Internet access, Internet access over television, and video-on-demand).

[12] *See Charter 10K Report*, at 4.

other features."[13] Other cable operators, such as Cox Communications, Comcast, and Cablevision also have upgraded their systems significantly in anticipation of the growth of the ITV market.[14]

By one estimate, "cable operators are spending billions to upgrade their systems to carry two-way signals, and three-quarters of those buildouts [may already be complete] in major markets."[15] NCTA observes that "millions of digital set-tops [are] now deployed in cable networks, and thousands more [are] installed every week."[16] According to the FCC, cable spent $4.5 billion dollars on system upgrades and $2.1 billion on equipment in 1999 alone.[17] The result? The FCC reports that revenue from advanced, analog two-way and digital video services was projected to more than double in 2000 to $4.2 billion.[18]

The Cable Services Bureau of the FCC reported to Congress that cable operators are already delivering Internet access through a television receiver rather than a personal computer.[19]

---

[13] *See* AOL Time Warmer, Inc. 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission, at I-3, I-10.

[14] *See* Cox Communications 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission, at 1 ("Additional services could include video on demand, Internet to the television, targeted advertising and other types of interactive and e-commerce applications"); Comcast Corp. 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission, at 4 ("We have and continue to upgrade our cable communications systems so that we can provide these and other new services such as video on demand, commonly known as VOD, interactive television and cable telephony more rapidly to our subscribers"); Cablevision Systems Corp. 10K Report for Fiscal Year Ending December 31, 2000, filed with the Securities and Exchange Commission, at 7 ("The Company is engaged in an ongoing effort to upgrade the technical capabilities of its cable plant and to increase channel capacity for the delivery of additional programming and new services. . . [T]he Company expects that by December 2001 approximately 97% of its subscribers will be served by systems having a capacity of at least 77 channels and 84% of the total plant will be 750 MHz capable two-way interactive.").

[15] Bruce Stephen and Mary Joy Scafidi, *Will Interactive TV Succeed?,* IDC Bulletin, at 2 (July 2000).

[16] Robert Sachs, NCTA President and CEO, *Cable and Video: Competitive Choices, Prepared Testimony Before the Senate Subcomm. On Antitrust, Business Rights and Competition, Senate Comm. On the Judiciary,* 107th Cong., at 8 (April 4, 2001).

[17] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 00-132, *Seventh Annual Report,* FCC 01-1, at ¶ 33 (rel. Jan. 8, 2001) (Seventh Annual Video Programming Report).

[18] *Id.* at ¶ 28 & n.65, ¶ 41 & n.126, Tbl. B-6.

[19] Cable Services Bureau, FCC, *Cable and Video: Competitive Choices, Prepared Testimony Before the Senate Subcomm. On Antitrust, Business Rights and Competition, Senate Comm. On the Judiciary,* 107th Cong., at 4 (April 4, 2001).

Cable operators also are pouring money into ITV content. For example, Comcast and Cox, along with Liberate Technologies and a number of venture-capital firms, have just recently invested $28 million in MetaTV Inc., which provides ITV portals, services, and enhanced applications, and allows cable operators to add ITV features to their service offerings.[20]

"Currently deployed digital set-tops ... make 'one-screen' interactivity a reality today," according to David Beddow, then chief executive officer of Liberty Livewire, a video post-production and distribution company.[21] Consequently, the Non-MVPD Owned Programming Networks disagree with those commenters that argue that ITV is too nascent a service to be worthy of Commission concern.[22] Clearly the FTC did not think so, as evidenced by its decision to create ITV-related conditions in its decision regarding the AOL Time Warner merger.

B. *ITV Includes, Among Other Things, Enhanced, Video Programming Enabled Through Consumer-Activated Triggers and Viewed Over a Single Screen*

Although the entire universe of services that comprise the ITV space may not yet be known, that universe is sufficiently understood, and the potential consumer harms caused by improper use of market power are sufficiently real, to warrant nondiscrimination safeguards. A recent national study indicates that "[t]he majority of consumers understand what interactive television is, they want it now, and they are willing to upgrade from analog to digital cable, or

---

[20] Matt Stump, *Comcast, Cox Back MetaTV*, MULTICHANNEL NEWS, April 23, 2001.

[21] *National Study Reveals Consumers Want Interactive TV Services Now, Willing to 'Trade Up' to Get Content: Cable, Satellite Customers Indicate Readiness to Advance to Digital, Switch Service Providers If They Can Get Currently Available Interactive Content*, BUSINESS WIRE, April 3, 2001, at 3 (National Study).

[22] *See* AOL Time Warner Comments at 1-2, 4-9, 16, 18; AT&T Comments at i-ii, 1-4, 8; Cablevision Comments at 1-2, 6, 19-20; Canal+ Comments at 1, 11, 25, 28; Charter Comments at 2-3; Comcast Comments at iii, v, 1-2, 5-7, 18; DIRECTV Comments at 2-3; Golf Channel *et al.* Comments at 1-2, 6-9; NFL Comments at 2; NCTA Comments at 1, 39, 55; Progress & Freedom Foundation Comments at 2, 4-5.

switch between cable and satellite services, in order to get interactive content delivered to their homes."[23]

The Non-MVPD Owned Programming Networks do not presume to define ITV for the entire industry, but they can describe the interactive content that is the focus of their own business plans going forward: additional or enhanced content offered in conjunction with video programming that is enabled by, or in response to, consumer-activated, on-screen triggers and viewed over a single screen. Few, if any, would question that such content constitutes ITV.

III. Vertically Integrated Broadband Distribution Providers Have the Incentive and Ability to Discriminate Against Unaffiliated ITV Content

A. Vertically Integrated Broadband Distribution Providers Have Economic Incentives to Discriminate Against Unaffiliated ITV Content

As Mr. Sidak[24] and Dr. Singer[25] explain more fully in their attached economic analysis, vertically integrated broadband distribution providers have economic incentives to discriminate

---

[23] *National Study*, at 1.

[24] Mr. Sidak is the F.K. Weyerhaeuser Fellow in Law and Economics at the American Enterprise Institute for Public Policy Research (AEI) and the president and chief executive officer of Criterion Economics, L.L.C. He has been a consultant on regulatory and antitrust matters to the Antitrust Division of the U.S. Department of Justice and to more than forty companies in the telecommunications, electric power, natural gas, mail and parcel delivery, broadcasting, newspaper publishing, recorded music, and computer software industries in North America, Europe, Asia, and Australia. He served as Deputy General Counsel of the FCC from 1987 to 1989, and as Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President from 1986 to 1987. He has testified before committees of the U.S. Senate and House of Representatives on regulatory and constitutional law matters, and his writings have been cited by the Supreme Court of the United States, the lower federal and state supreme courts, state and federal regulatory commissions, and the European Commission. Following law school, he served as a law clerk to Judge Richard A. Posner during his first term on the U.S. Court of Appeals for the Seventh Circuit.

[25] Dr. Singer is Senior Vice President of Criterion Economics. His areas of expertise include antitrust, as well as telecommunications and the Internet. He has prepared economic expert testimony in support of, or in opposition to, many major telecommunications mergers, including AOL-Time Warner, AT&T-MediaOne, Bell Atlantic-GTE, Deutsche Telekom-VoiceStream Wireless, and WorldCom-Sprint. He has made merger presentations to staff economists and lawyers at the Antitrust Division of the Department of Justice, Federal Communications Commission, and Federal Trade Commission. He has worked on pricing and takings matters concerning mandatory access to telecommunications networks, as well as on empirical estimations of demand for broadband telecommunications services. His current working papers examine access policy for high-speed Internet systems. Before joining Criterion Economics, he managed the telecommunications practice at an internationally recognized consulting firm. In addition, he has worked as an economist for the Securities and Exchange Commission.

against unaffiliated ITV content.[26] The cost of such discrimination is the potential loss in revenue from customers who demand the denied ITV content.[27] Discriminatory behavior can, however, increase sales of affiliated content and the related national advertising.[28]

The comments of the Non-MVPD Owned Programming Networks identify a number of ways that vertically integrated broadband distribution providers can discriminate against unaffiliated ITV content. According to Mr. Sidak and Dr. Singer, a vertically integrated broadband distribution provider with market power has an incentive to refuse to deal with an unaffiliated ITV content provider because doing so can deny the rival content provider access to a critical mass of viewers, force the rival out of the market, and thus extend the vertically integrated broadband distribution provider's market share for content.[29] By limiting the success of rival content, vertically integrated broadband distribution providers can also exert more influence over rival broadband distribution providers' access to enhanced programming, thereby protecting the vertically integrated broadband distribution provider's market share of distribution services from future competition.[30] Because of these incentives, Mr. Sidak and Dr. Singer conclude that it would not be premature for the Commission to consider nondiscrimination safeguards for ITV, even if ITV were nascent.[31]

---

[26] *See* Attachment A at ¶¶ 26-34.

[27] *See id.* at ¶¶ 1, 47-48.

[28] *See id.*

[29] *See id.* at ¶¶ 31, 42.

[30] *See id.* at ¶¶ 32-33, 43-44.

[31] *See id.* at ¶¶ 2-3, 25, 48, 55, 63-64.

B. The Market Power of Cable Operators over the Distribution of Video Programming, and the Technological Advantages of the Cable Platform in the Delivery of ITV, Enable Cable Operators to Discriminate Against Unaffiliated ITV Content

An examination of the video programming market indicates that cable operators currently have market power over the distribution of video programming and an incentive to discriminate, as the Non-MVPD Owned Programming Networks explain in their comments and Mr. Sidak and Dr. Singer explain in their attached economic analysis.[32] The FCC's seventh annual report on the video programming market indicates that cable operators passed more than 96 percent of TV households and had more than 80 percent of the multichannel video programming distribution market as of June 2000.[33] Mr. Sidak and Dr. Singer also note favorably the General Accounting Office's observation that the availability of DBS has not exerted meaningful downward pricing pressure on cable services.[34]

Some commenters seize upon the fact that the 1996 Telecommunications Act and the Satellite Home Viewers Improvement Act ("SHVIA") have been enacted since passage of the 1992 Cable Act to somehow signify decreased concern about cable's market power.[35] That argument is unavailing. The 1996 Act did not repeal or modify the nondiscrimination provisions of the 1992 Cable Act. Enactment of SHVIA in 1999 reflects a recognition by the Congress that DBS was not a truly meaningful competitor to cable because it was not a fully substitutable

---

32 *See* Non-MVPD Owned Programming Networks Comments at 13-15; Attachment A at ¶¶ 6-7, 24, 38-39, 46-48. *See also* ALTV Comments at 3-4, 7-9; CERC Comments at 4-5; Consumers Union Comments at 1, 2, 5; EchoStar Comments at ii-iii, 1, 3-8; NAB Comments at i-ii, 2, 12-20, 24-29.

33 *Seventh Annual Video Programming Report*, at ¶ 18, Tbl. C-1. Note, also, that the mere presence of a second competitor in a local market does not weaken a distribution provider's market power over ITV, particularly in light of the network effects involved in ITV. *See* ALTV Comments at iii, 12-13; CERC Comments at 6-7; Non-MVPD Owned Programming Networks Comments at 21.

34 Attachment A at ¶ 38.

35 Comcast Comments at iv, 9-10; NCTA Comments at 24-27.

product. Thus, citations to these recent laws do not refute the fact that cable continues to have market power over the MVPD market, as attested by the FCC's seventh annual report.

Cable's technological advantages in providing two-way, enhanced, video programming enabled through consumer-activated triggers and delivered synchronously over a single screen also allow the cable platform to provide the most attractive ITV services package. Some commenters in this proceeding have tried to downplay the significance of cable's technological advantages over rival distribution providers of ITV by dismissing the significant impact that the broadband transition is having on ITV. One commenter, for example, states that "virtually every ITV service today that incorporates a two-way connection to the Internet does so via a dial-up connection—and there is no reason to suggest that that will change in the future."[36] But as the Non-MVPD Owned Programming Networks explain in their comments—and cable companies demonstrate incontrovertibly with their billion-dollar investments in broadband modems and network upgrades—we are witnessing the convergence of various Internet, television, and telecommunication digital technologies into a broadband, single-screen, interactive experience.[37]

For example, according to a recent national study by Boyd Consulting, "overall, the delivery option that consumers liked best was the on-the-TV screen overlay enhanced by a handheld touch-screen control device," as opposed to two-screen delivery.[38] That consumers would prefer a one-screen experience to a two-screen experience really is not surprising. Approximately one-third of viewers have their televisions in the same rooms as their computers, and yet only five percent of television households use the Internet on their computers in

---

[36] AOL Time Warner Comments at 12.

[37] *See* Non-MVPD Owned Programming Networks Comments at 6.

[38] *National Study*, at 1-2.

conjunction with what's on their TVs.[39] In fact, 40 percent of satellite customers participating in the Boyd survey indicated that they would switch to digital cable if the one-screen option was not available over satellite.[40] "[A]s the Web hosts more entertainment programming, many feel it could be better suited to a TV set than a computer screen."[41] Provision of such single-screen ITV will demand the capacity and simultaneity that only broadband can provide.

Some cable operators have already begun expressly reserving the right to deny access to the broadband return path to consumers who view Disney and NBC programming over the cable operators' systems.[42] And as SBC and BellSouth put it:

> [i]n ITV services, ... the cable platform possesses significant technical advantages over competing platforms, such that cable may be the 'one delivery platform' that can fully support the market. Moreover, cable's enduring power in the MVPD market may prevent competing platforms from gaining access to the 'specific video signal with which ITV content is to be associated,' thus preventing ITV services provided over that platform from being 'precisely synchronized with the video signal.'"[43]

Potential rivals are not technologically capable of offering video programming enhanced with interactivity and a reliable broadband return path on a cost-effective basis for the foreseeable future. Nor do they have the economies of scale to replicate the vertically integrated

---

[39] Craig Leddy, *Remember: I in ITV Isn't for Internet,* MULTICHANNEL NEWS, Feb. 12, 2001, at 42.

[40] *National Study*, at 2-3.

[41] Jared Sandberg, *After 50 Years of Effort, Interactive TV May Be Here,* WALL ST. J., Dec. 7, 2000, at B1.

[42] *See In re* Application of America Online Inc. and Timer Warner Inc. for Transfers of Control, CS Docket No. 00-30, *Ex Parte Submission of the Walt Disney Company: Deployment of Interactive Television Technology and Return Path Discrimination*, at 2-3 (filed Oct. 25, 2000), *Ex Parte Letter from Diane Zipursky, Vice President, Washington Law and Policy, National Broadcasting Co. to Magalie Roman Salas, Secretary, FCC,* at 2 (filed Sept. 29, 2000).

[43] SBC/BellSouth Comments at 9 (quoting ITV NOI at ¶¶ 1, 19-20, 26).

cable broadband distribution model. Arguments that satellite, DSL, wireless, analog and digital broadcast, or cable overbuilders now provide viable alternative platforms to incumbent cable operators in the delivery of interactive content[44] are seriously mistaken, as the comments of the Non-MVPD Owned Programming Networks demonstrate.[45] Currently, DBS' inability to provide true, single-screen, two-way interactivity without relying on a telephone return path[46] eliminates it as an adequate substitute to cable.[47] Even direct broadcast satellite (DBS) provider EchoStar has acknowledged the superiority of the cable platform:

> first, because the current one-way DBS satellite distribution platform simply cannot compete against a bundle of video, two-way broadband and telephony offered by companies such as AT&T, and second, because radio spectrum limitations mean that satellite operators cannot begin to try to match the type of bandwidth that fiber optic can provide. While EchoStar has embarked upon a very ambitious plan to compete with the likes of AT&T in providing broadband service, EchoStar's current offering, through its participation in the StarBand venture with Gilat, is relatively cumbersome for consumers because it requires an additional and relatively large dish. EchoStar's next-generation broadband plans—involving use of the Ka-band—are also seriously bandwidth-limited.[48]

DIRECTV has similarly pointed out that "[u]nlike cable operators, which have the ability to increase their channel capacity indefinitely, DBS providers face very tangible channel capacity

---

[44] AOL Time Warner Comments at 2-3, 9-17; AT&T Comments at i-ii, 11, 14-26; Cablevision Comments at 1, 3, 6, 15-20; Canal+ Comments at 3, 14, 17, 21, 27; Charter Comments at 6-9; Comcast Comments at iii-iv, 3-5, 10; Golf Channel *et al.* Comments at 10-13; NCTA Comments at 4-5, 17, 20-24, 33-34, 55; OpenTV Comments at 9-12; Progress & Freedom Foundation Comments at 5-6.

[45] Non-MVPD Owned Programming Networks Comments at 13-15.

[46] *See Seventh Annual Video Report*, at ¶¶ 77-79.

[47] DBS providers are apparently working on a way to provide a high-speed return path that would require deploying satellite uplinks in the home. If and when DBS providers accomplish this, they are unlikely to be cost competitive, at least initially, because deploying satellite uplinks will be far costlier than merely tapping existing, deployed cable facilities.

[48] *In re* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185, *EchoStar Comments*, at 5 (rec. Nov. 27, 2000).

constraints."[49] Synchronizing video and enhanced content is also extremely difficult on satellite systems.[50] Slowing DBS growth only compounds the problem, and cable operators are expected to add 1.5 times the number of digital subscribers as DBS.[51] Price points are also an issue in light of estimates that cable ITV software generates four times the revenue per user as satellite software.[52]

Investment capital for overbuilders has also dried up along with the stock market decline, making overbuilders an unrealistic competitive threat for ITV services.[53] DSL is also unavailable except for consumers in close proximity to the telephone companies' facilities.[54] Similarly, "[y]ou basically have to see the central office" to be able to use VDSL, according to Erin Dunne, director of research for consulting and research firm Vertical Systems Group.[55] Explaining that ITV will not succeed absent broadband capacity in both directions, WebTV Vice President Shari Glusker has noted that using dial-up as a return path is "a less than fabulous experience."[56] Accordingly, the Non-MVPD Owned Programming Networks strongly disagree with commenters that argue broadband capacity and synchronicity are not necessary to provide ITV.[57]

---

[49] Eddy W. Hartenstein, DIRECTV Global Chairman, *Cable and Video: Competitive Choices, Prepared Testimony Before the Senate Subcomm. On Antitrust, Business Rights and Competition, Senate Comm. On the Judiciary*, 107th Cong., at 4 (April 4, 2001).

[50] *See CES Notebook*, Communications Daily, Jan. 9, 2001, at 3.

[51] *See Analysts Bullish on Cable Stocks Despite Slumping Prices*, COMMUNICATIONS DAILY, Dec. 7, 2000, at 4-5 (Analysts Bullish).

[52] Jana Sanchez, *OpenTV Looks to Cable, ADSL*, REUTERS, FEB. 13, 2001.

[53] *See Analysts Bullish*, at 4.

[54] Geraldine Fabrikant and Seth Schiesel, *Satellite Vs. Cable: A Rivalry Beyond TV*, N.Y. TIMES, Feb. 19, 2001, at C1.

[55] Aaron Donovan, *Faster Data Connection Waits Impatiently in Line*, N.Y. TIMES, March 22, 2001, at E3.

[56] *Congressional Concerns About Datacasting Called Misplaced at CES*, COMMUNICATIONS DAILY, Jan. 10, 2001, at 2. *See also* Ariana Eunjung Cha, *Broadband's a Nice Pace if You Can Get It*, WASH. POST, Feb. 28, 2001, at G4 (stating that "data has had trouble squeezing through the decades-old thin copper wires").

[57] AOL Time Warner Comments at 13, 17-18; AT&T Comments at 23-24; Canal+ Comments at 2, 3, 20-21 (stating, however, that cable is only platform with broadband up-stream capability).

Some commenters have argued that because certain non-cable companies are now offering the most rudimentary, narrowband aspects of TV interactivity, there is "no basis at all" for the Commission's conclusion that cable's broadband facilities are, and will continue to be, the dominant and preferred means for distributing ITV services.[58] Companies offering a few narrowband interactive services do not have a realistic chance of competing in the market against a vertically integrated broadband distribution provider that has the capability of aggregating a variety of ITV content and services, especially video programming enhanced with two-way interactivity and high-speed Internet connectivity through a digital set-top box on one screen. In this respect, no potential rival can challenge cable's market power over ITV. As Mr. Sidak and Dr. Singer explain more fully, this lack of alternatives to the cable broadband platform gives vertically integrated cable ITV distribution providers a *significant* incentive to discriminate against unaffiliated ITV content.

IV. Now Is the Time To Create Nondiscrimination Safeguards to Protect Consumers

A. Non-MVPD Owned Programming Networks Seek Enforcement-Based Safeguards, Not Open Access, Common Carriage, or Must Carry

The Non-MVPD Owned Programming Networks are not asking the Commission to impose ITV open-access, common-carriage, or must-carry obligations on cable operators or any other broadband distribution providers.[59] Rather, they are calling for anti-discrimination rules as the foundation of an enforcement mechanism that will provide a remedy should vertically integrated distribution providers improperly use their market power.[60]

---

[58] *See* NCTA Comments at 20-23.

[59] *See* Non-MVPD Owned Programming Networks Comments at 7 n.19, 16, 20 & n.49, 23 & n.60, 26 & n.73.

[60] *See id.* at 21. *See also* ALTV Comments at 19-20; Consumers Union Comments at 3, 11, 12; MSTV Comments at 9.

Under these safeguards, any vertically integrated broadband distribution provider with market power that has already entered into an agreement to carry the regular video programming of an unaffiliated programming provider would not be allowed to treat the enhanced ITV content that the unaffiliated programmer transmits with its signal any differently than the distribution provider treats the enhanced ITV content of an affiliated programmer. Thus, if a vertically integrated broadband distribution provider with market power enables its customers of video programming to receive affiliated ITV enhancements, the distribution provider must not use its control over the video stream, the two way connection, or customer premises equipment such as the set-top box to block, strip, degrade, or otherwise discriminate against the ITV content of an unaffiliated provider.[61] Nor should the distribution provider be allowed to use market power to require business arrangements—such as conditions regarding exclusivity, screen bias, access payments, or advertising and t-commerce revenue—that discriminate against the negotiating ITV provider or unaffiliated third parties.[62] Such an enforcement mechanism would encourage investment by ITV content providers and would ensure that consumers benefit from diverse content and competition in ITV services.

B. *Safeguards Promote Investment In, Deployment of, and Competition for Broadband and ITV Services*

The Non-MVPD Owned Programming Networks reiterate the critical role ITV nondiscrimination safeguards will have in continuing the Internet's growth, which has resulted from the open nature of the narrowband, common-carrier platform.[63] Some commenters argue

---

[61] *See* Non-MVPD Owned Programming Networks Comments at 16-20.

[62] *See id.*

[63] *See id.* at 7-8; Consumers Union Comments at 4, 13; NAB Comments at i, 1-5.

that nondiscrimination safeguards will chill broadband investment,[64] but cable operators' investments, discussed above, and the ITV as well as non-ITV benefits that such investments confer, indicate that nondiscrimination safeguards are unlikely to deter broadband upgrades, as explained in the Non-MVPD Owned Programming Networks' Comments and the economic analysis of Mr. Sidak and Dr. Singer.[65]

In fact, nondiscrimination safeguards will promote investment in, deployment of, and competition for ITV and broadband services, as the Non-MVPD Owned Programming Networks also explain in their Comments.[66] Indeed, the primary reason many companies have been able to support their present levels of investment in ITV content and interactivity has been the fact that consumers now can access first-generation interactive services over the open telephone network. Absent such safeguards in the broadband context, vertically integrated broadband distribution providers can use their control over the platform to strip or degrade rivals' ITV enhancements on their own systems, or exert their market power to demand exclusivity agreements or monopoly rents. As Mr. Sidak and Dr. Singer indicate in their attached economic analysis, such tactics, if permitted, will deny competing ITV providers the necessary footprint or revenue streams to justify their investments.[67] Thus, the absence of safeguards is what will discourage ITV

---

64 AOL Time Warner Comments at 3; AT&T Comments at ii, 31-32; Cablevision Comments at 1-4, 9-10, 20; Charter Comments at 3-5; Comcast Comments at v, 3, 18; DIRECTV Comments at 3; Golf Channel *et al.* Comments at 2, 5, 12-13, 17-19; NCTA Comments at 1-7, 19-20, 28-29, 35-39; OpenTV Comments at 1-2, 12-14; Progress & Freedom Foundation Comments at 6-7.

65 *See* Non-MVPD Owned Comments at 10; Attachment A at ¶ 56.

66 Non-MVPD Owned Programming Networks Comments at 10. *See also* ALTV Comments at ii, 3; Consumers Union Comments at 2-5; MSTV Comments at 3-4; NAB Comments at 7-9.

67 *See* Attachment A at ¶¶ 45, 51, 55.

investment, both by unaffiliated content providers unsure of the availability of a distribution channel, and unaffiliated distribution providers unsure of the availability of sufficient content. Consequently, the shift to the closed, broadband platform may prevent ITV from developing as rapidly as the Internet, which currently travels primarily over the open, narrowband, wireline telecommunications network.

Some commenters describe the creation of nondiscrimination requirements as antithetical to encouraging facilities-based competition.[68] Mr. Sidak and Dr. Singer demonstrate the opposite—that in the long term, a struggling, unaffiliated content market will take unaffiliated broadband providers down with it, thereby <u>undermining</u> facilities-based competition. In addition, confining the options of unaffiliated ITV providers to buying existing broadband pipes is impractical and unwise because of the prohibitive costs, limited acquisition opportunities in a consolidating market, and resulting loss of diverse and independent content and distribution providers, as the Non-MVPD Owned Programming Networks point out in their Comments.[69]

Moreover, the high costs of building or purchasing a distribution network are a barrier to entry, as Congress and the Commission recognized in their efforts to promote local telephone competition through resale and unbundling. In any event, nondiscrimination safeguards do not prevent facilities-based competition. ITV providers that have entered the market will build their own networks or vertically integrate if there truly are market benefits. For now, however, it is more important to encourage the supply and demand for ITV services by adopting safeguards that remove the specter of discrimination.

---

[68] Charter Comments at 5-7.

[69] Non-MVPD Owned Networks Comments at 12. *See also* EchoStar Comments at 4.

C. Creating Safeguards Now Is Consistent With FCC Precedent

Creating nondiscrimination safeguards is consistent with FCC precedent regarding the elimination of barriers to entry and competition, as the Non-MVPD Owned Programming Networks point out in their Comments.[70] Because this proceeding involves the relatively new, enhanced video content of ITV, some commenters would have the Commission believe that the FCC must throw out all it has learned from its dominant carrier proceedings, the 1992 Cable Act, and the 1996 Telecommunications Act. The issues here are nothing new. In certain circumstances, described in Part III and the attached economic analysis of Mr. Sidak and Dr. Singer, firms have an economic incentive to leverage market power over new services. The ability of firms to exercise that power, particularly for services such as ITV that require significant capital outlay, can induce existing unaffiliated content firms to exit the industry or reduce investment in interactive applications.

Congress and the Commission have long recognized this incentive to discriminate and its consequences. Thus, there are a number of examples in which Congress and the Commission sought to limit the improper use of market power and to lower barriers to entry to protect consumers, encourage investment and innovation, and promote competition—even for relatively new technologies and services. For example, sections 274 and 275 placed restrictions on the provision by Regional Bell Operating Companies (RBOCs) of electronic publishing and alarm monitoring services even though those markets could arguably have been described as nascent at the time.[71] Similarly, as BellSouth and SBC explain, the Commission has required incumbent

---

[70] Non-MVPD Owned Programming Networks Comments at 9. *See also* NAB Comments at 11.

[71] *See* 47 U.S.C. §§ 274, 275.

local exchange carriers (incumbent LECs) to provide competitors with nondiscriminatory access to new, advanced services and facilities.[72]

The point in each of these instances was not that the carriers already had a hold on the respective new services. The point was that there was an obvious incentive for the carriers to use their existing market power in other areas to secure a hold over newer markets. Thus, Congress and the Commission sought to create safeguards until they were assured that new entrants and existing carriers could make the investments and gain the necessary market share so that the RBOCs and incumbent LECs could not unfairly extend the market power they had in other areas. In the words of SBC and BellSouth, "[t]his exact same legal paradigm applies to the emerging market for ITV services. ... [T]he relevant question is whether any particular platform for providing that 'two-way connection' possesses market power that could thwart the growth of this vital new market."[73]

Consequently, those commenters arguing that creating nondiscrimination safeguards for ITV would be unprecedented[74] are simply wrong. In fact, just the opposite is true. As SBC and BellSouth point out, "if ... cable does possess market power, <u>Commission precedent requires</u> the implementation of equal access and nondiscrimination principles to ensure that cable does not impede the growth of ITV services."[75] This is not to say that regulation should favor one sector

---

[72] *See* SBC/BellSouth Comments at 6. *See, e.g., In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, *Memorandum Opinion and Order*, 13 FCC Rcd. 24011 (1998), *First Report and Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd. 4761 (1999), *Second Report and Order*, FCC 99-330 (rel. Nov. 9, 1999), *Third Report and Order*, FCC 99-355 (rel. Dec. 9, 1999), *Fourth Report and Order*, 15 FCC Rcd. 3089 (2000).

[73] *See* SBC/BellSouth Comments at 7.

[74] AOL Time Warner Comments at 3, 8, 18-19; AT&T Comments at 32-35; Cablevision Comments at 3-4; Charter Comments at 3-4; Comcast Comments at 2; Golf Channel *et al.* Comments at 2, 17-18, 22-24; NCTA Comments at 2, 27.

[75] *See* SBC/BellSouth Comments at 1 (emphasis added). *See also id.* at 6-7 (citing, as an example, *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, *Memorandum Opinion and Order*, 13 FCC Rcd. 24011, 24030-31 ¶ 37 (1998)).

of the communications industry over another. Rather, protections are sometime necessary to prevent the economic incentives of firms with market power from skewing market forces as they apply to developing technologies and services. Nor is this inconsistent with a shift toward a regime of deregulatory enforcement and away from one of prophylactic regulation. The Non-MVPD Owned Programming Networks are asking for a set of nondiscriminatory safeguards that can be employed through an enforcement mechanism.

D. Safeguards Ensure That Operation of Market Forces—Not Market Power—Determines Successful ITV Technology and Business Models

The FCC must create safeguards to ensure that the growth of ITV is not stunted at the outset, as the Non-MVPD Owned Programming Networks explain in their Comments.[76] Most commenters agree with the Non-MVPD Owned Programming Networks that nondiscrimination safeguards are appropriate now,[77] or if the Commission makes a finding regarding market power.[78] By contrast, only the six cable commenters and the Progress and Freedom Foundation completely oppose nondiscrimination safeguards.[79]

The Non-MVPD Owned Programming Networks <u>do not</u> think the laws of the marketplace should be suspended for ITV. To the contrary, the Non-MVPD Owned Programming Networks agree with commenters such as AOL Time Warner, AT&T, Cablevision, and NCTA, that the marketplace should sort out the provision of ITV.[80] That is

---

[76] Non-MVPD Owned Programming Networks Comments at 7-10 *See also* Consumers Union Comments at 8; Gemstar Comments at 2, 5-6; MSTV Comments at 5; TiVo Comments at 2.

[77] *See* Comments of: ALTV, CERC, Consumers Union, EarthLink, EchoStar, Gemstar, MSTV, NAB, and TiVo.

[78] *See* Comments of: Canal+, DIRECTV, The Golf Channel *et al.*, NFL, OpenTV, PBS, and SBC/BellSouth.

[79] *See* Comments of: AOL Time Warner, AT&T, Cablevision, Charter, Comcast, NCTA, and Progress & Freedom Foundation.

[80] AOL Time Warner Comments at 3-4, 18; AT&T Comments at 28-30; Cablevision Comments at 4, 6, 10-15, 20; NCTA Comments at 5, 7. *See also* Canal+ Comments at 3, 16-19, 22-23, 25-28; Golf Channel *et al.* Comments at 20; OpenTV Comments at 21-22.

precisely why the Commission must create safeguards to prevent vertically integrated distribution providers from leveraging their market power to stifle competition for ITV.[81] Rather than skew the market, the technology-neutral safeguards that the Non-MVPD Owned Programming Networks advocate[82] will let competitive forces—as opposed to market power—be the arbiter of successful technology and business models for ITV. If there are benefits to be gained from vertical integration, then the market will still move toward vertical integration in the absence of improper use of market power. Safeguards will not prevent ITV providers from moving toward efficient business models. Instead, they will ensure that any advantages vertically integrated ITV providers obtain in the market are the result of market efficiencies such as economies of scale, and not anti-competitive, discriminatory practices.

E. Creating Safeguards Now is Less Costly and Less Invasive Than Undoing Competitive Harms Later

The nondiscrimination safeguards that the Non-MVPD Owned Programming Networks propose do not constitute burdensome, costly, prophylactic regulations that interfere with the market. In fact, the use of technology-neutral nondiscrimination safeguards would be one of the *least* intrusive ways for the Commission to ensure that any vertically integrated broadband distribution provider—whether a cable operator, telecommunications carrier, or satellite provider—does not discriminate against unaffiliated ITV content.

The only way nondiscrimination safeguards will impose a cost on distribution providers is if the distribution providers wish to discriminate, in which case the cost of the safeguards will be far less than the cost that the entire industry and consumers would incur if the distribution

[81] Consumers Union Comments at 8; Gemstar Comments at 2, 5-6; MSTV Comments at 5; Non-MVPD Owned Programming Networks Comments at 7-10; TiVo Comments at 2.

[82] Non-MVPD Owned Programming Networks at ii, 2, 21. *See also* ALTV Comments at ii-iii, 12; Consumers Union Comments at 1, 2, 11-12, 27; Gemstar Comments at 6; MSTV Comments at 2; TiVo Comments at 4.

providers' market power went unchecked. And in light of cable operators' statements that they do not intend to discriminate,[83] there should seldom be a need to invoke the safeguards and initiate an enforcement proceeding. Moreover, trying to remedy entrenched discriminatory practices down the road will be far more costly than creating safeguards to stem those practices at the outset, as the Non-MVPD Owned Programming Networks explain in their Comments.[84] Crafting these safeguards will not be overly difficult, especially since the conditions in the AOL Time Warner merger decision by the FTC already provide a template from which to start.

V. The FCC Has Authority to Create ITV Safeguards

The Act provides the FCC with more than sufficient authority to create nondiscrimination safeguards, as the Non-MVPD Programming Networks explain in their comments.[85] The FCC can take either a cross-platform approach or a platform-specific approach.

A. Authority over ITV Distribution, Regardless of Platform, as a Telecommunications Service

Under the cross-platform approach, the FCC would create nondiscrimination safeguards on the grounds that the transmission of ITV services, regardless of platform, is a telecommunications service subject to the Commission's authority under Title II, as supported by

[83] AT&T Comments at 27; Cablevision Comments at 4; NCTA Comments at 5, 29-30, 34.

[84] Non-MVPD Owned Programming Networks Comments at ii. *See also* Consumers Union Comments at 3, 4, 7, 18; MSTV Comments at 2, 5-6; NAB Comments at i, 2, 6-7; TiVo Comments at 2.

[85] *See* Non-MVPD Owned Programming Networks Comments at 21-26.

Title I and sections such as 256, 257, and 706.[86] BellSouth and SBC concur.[87]

The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[88] When a distribution provider transmits ITV enhancements, such as ATVEF triggers and content, that an ITV content provider originates, the distribution provider has transmitted information specified by the ITV content provider to the consumer. Similarly, when the customer interacts with the ITV enhanced video, such as by indicating one among several choices or keying in information, the distribution provider has transmitted signals specified by the consumer to the ITV content provider or other ITV user of the consumer's choosing. Telecommunications has occurred in both instances. Thus, AT&T is incorrect when it states that "cable ITV services undeniably include information of the cable operator's choosing."[89] By interacting, consumers and ITV content providers are choosing the information that flows over the distribution platform.

The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of facilities used."[90] By providing transmission capability to its end-user

---

86 *See* Non-MVPD Owned Programming Networks Comments at 22-24. *See also* 47 U.S.C. § 256 (promoting "nondiscriminatory accessibility by the broadest number of users and vendors of communications products and services" and "to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks"); 47 U.S.C. § 257 (directing the Commission "to promote the policies and purposes of [the] Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest"); 47 U.S.C. § 157 nt (directing the Commission to encourage deployment of advanced telecommunications capability).

87 SBC/Bell South Comments at 2, 4-8. *See also* Consumers Union Comments at 9; MSTV Comments at 9-10. We note that although BellSouth and SBC agree that the Commission has authority to regulate ITV transport under Title II, they argue the Commission should not exercise that authority absent a finding regarding market power.

88 47 U.S.C. § 153(43).

89 AT&T Comments at 37. *See also* Comcast Comments at 16 (making similar statement).

90 47 U.S.C. § 153(46).

customers, as well as to affiliated or unaffiliated ITV content providers, distribution providers are making telecommunications effectively available directly to the public for a fee. As AT&T itself concedes, ITV services can be viewed "as 'information services' because they make available information to subscribers 'via telecommunications.'"[91]

It is precisely this characterization of ITV services as being transmitted "via telecommunications" that suggests that the underlying broadband distribution providers are providing a telecommunications service when they distribute ITV, much like wireline carriers when they provide Internet access. The cable operators are confusing the ITV service with the ITV transmission. The latter is the telecommunications service. Under this analysis, the FCC would be creating ITV safeguards that apply, not to a cable service, but to a telecommunications service: the offering of ITV transmission capability to the public. In other words, broadband ITV distribution would be the telecommunications service that broadband distribution providers are offering. Thus, section 624(f), cited by AT&T, Charter, and NCTA,[92] would not apply, because it only prohibits "requirements regarding the provision or content <u>of cable services</u>."[93]

The Non-MVPD Owned Programming Networks' conclusion that the provision of ITV distribution can be treated as a telecommunications service does not, however, mean that the FCC must regulate distribution providers as common carriers when they transmit ITV enhancements, or that the FCC must create ITV must-carry obligations.[94] The Non-MVPD Owned Programming Networks are asking only for safeguards which ensure that, if a distribution provider allows its consumers to receive ITV services in conjunction with some—

---

[91] AT&T Comments at 36. *See also* Comcast Comments at 17 (providing similar analysis).

[92] AT&T Comments at 37; Charter Comments at 10; NCTA Comments at 46-48.

[93] 47 U.S.C. § 544(f)(1)(emphasis added).

[94] *See* Non-MVPD Owned Programming Networks Comments at 7 n.19, 16, 20 & n.49, 23 & n.60, 26 & n.73.

presumably affiliated—video programming, it does not strip, degrade, or otherwise discriminate against ITV enhancements provided in conjunction with other unaffiliated video programming it has agreed to carry. Thus, the FCC could forbear, to the extent necessary, from applying general common carrier obligations, as the Non-MVPD Owned Programming Network suggest in their Comments.

An alternative way to conceptualize this is that the distribution provider has not provided an ITV-related telecommunications service until it first transmits ITV enhancements over its platform.[95] Only then do the safeguards apply, and they apply only to prevent discrimination, not to require the distribution provider to provide anything to one ITV content provider that it is not already providing to itself or another ITV content provider. Thus, section 621(c), also cited by AT&T, Charter, Comcast, and NCTA,[96] which prohibits subjecting cable operators "to regulation as a common carrier or utility by reason of providing any cable service,"[97] does not apply because the safeguards would not treat cable operators as common carriers. Nor would it be accurate to say that the safeguards apply to cable operators by reason of their providing cable service any more than it would to say that Title II applies to cable operators by reason of their providing cable service when cable operators provide telephony over their systems. Thus, the Non-MVPD Owned Programming Networks disagree with commenters that argue that the

---

[95] *Cf.* SBC/BellSouth Comments at 5 (stating that "where a Title I ITV service provider *self-provides* the transmission component of its service offering, it may *also* be subject to regulation as a common carrier under Title II").

[96] AT&T Comments at 37; Charter Comments at 9-10; Comcast Comments at 15-16; NCTA Comments at 45-46.

[97] 47 U.S.C. § 541(c)(emphasis added).

Commission is precluded from regulating the distribution of ITV as a telecommunications service under Title II.[98]

B. Authority over Cable Distribution of ITV as a Cable Service

Alternatively, under the platform-specific approach, the FCC could root its ITV nondiscrimination safeguards on its authority over the particular technology that serves as the distribution platform in a given circumstance: Title II for wireline and wireless, Title III for broadcast and satellite, and Title VI for cable.[99] For example, the FCC could conclude, as do AT&T, Comcast, and NCTA, that ITV is a cable service when provided over cable facilities.[100] The Commission would then have authority to create nondiscrimination requirements under Title VI.[101]

For example, Section 613 authorizes the Commission to create safeguards to "ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors."[102] Similarly, Section 616 would authorize the FCC to create safeguards prohibiting a multichannel video programming distribution provider from requiring as part of a carriage agreement: 1) a financial interest in an ITV service, such as an equity position, or sharing of subscription or advertising revenue; 2) an

---

[98] AT&T Comments at 35-38; Charter Comments at 9-10; Comcast Comments at 15-16; NCTA Comments at 44-48.

[99] *Accord* Consumers Union Comments at 9-10.

[100] AT&T Comments at 35-36; Comcast Comments at 14; NCTA Comments at 6, 41-44. *See also* Non-MVPD Owned Programming Networks Comments at 24-25.

[101] *See* ALTV Comments at iii-iv, 17-18; Consumers Union Comments at 10; NAB Comments at 14-15; Non-MVPD Owned Programming Networks Comments at 24-26.

[102] 47 U.S.C. § 533(f)(2)(B).

exclusivity arrangement; or 3) discriminatory terms or conditions.[103] Thus, the Non-MVPD-Owned Programming Networks disagree with commenters that argue that Title VI does not authorize nondiscrimination safeguards.[104]

Because the nondiscrimination safeguards proposed by the Non-MVPD Owned Programming Networks do not amount to common carrier regulation, Section 621 does not apply, as discussed in Part V.A. Similarly, Section 624(f), also discussed in Part V.A, does not apply. Section 624(f) prohibits "requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]."[105] Because the safeguards the Non-MVPD Owned Programming Networks advocate would only prohibit stripping, degrading, or otherwise discriminating against the ITV enhancements <u>of video programming that the cable operators arranged to carry pursuant to a carriage agreement</u>, the safeguards do not create the carriage obligation. In any event, the safeguards would be authorized by sections such as 613 and 616, and thus meet the "as expressly provided by Title VI" exception.

VI. Nondiscrimination Safeguards Are Consistent with the First Amendment, *Turner Broadcasting* and the D.C. Circuit's Recent Decision in *Time Warner v. FCC*

As the Non-MVPD Owned Programming Networks explained in their Comments, nondiscrimination requirements boil down to content-neutral, economic regulations designed to preserve consumer access to ITV delivered over broadband distribution platforms.[106] Consequently, they are subject to the intermediate First Amendment scrutiny that the Supreme

---

[103] *See* 47 U.S.C. § 536.

[104] Comcast Comments at 14; NCTA Comments at 6, 48.

[105] 47 U.S.C. § 544(f)(1)(emphasis added).

[106] Non-MVPD Owned Programming Networks Comments at 27.

Court discussed in *Turner Broadcasting Sys. Inc. v. FCC*,[107] and that the D.C. Circuit recently applied in *Time Warner v. FCC*.[108]

As the Non-MVPD Owned Programming Networks also pointed out in their Comments, there is a substantial governmental interest, expressed in various provisions of the Communications Act, to promote fair competition, consumer choice, the growth of broadband services, and a multiplicity of channels for expression.[109] Applying the safeguards only to those vertically integrated broadband distribution platforms and providers capable of exerting market power also appropriately tailors the requirement.[110] Moreover, the safeguards would remedy the very real harms that history has shown are posed by the economic incentive and ability of vertically integrated distribution providers to discriminate. Such incentives and ability are still present, as borne out by the market-share data provided by the Commission's recent annual report on the video programming market.[111] Thus, the Non-MVPD Owned Programming Networks disagree with commenters that cast ITV requirements as content-based regulation that would infringe vertically integrated broadband distribution providers' editorial discretion for the sake of what they describe as conjectural harms.[112]

VII. Conclusion

Narrowband, two-screen ITV is here. The infrastructure for broadband, single-screen ITV has been—and continues to be—deployed. The question squarely before the Commission is what

---

[107] *See id.*

[108] *See* 240 F.3d 1126 (D.C. Cir. 2001).

[109] *See* Non-MVPD Owned Programming Networks Comments at 27.

[110] *See id.* 27.

[111] *See Seventh Annual Video Programming Report.*

[112] AT&T Comments at iii, 38-39; Cablevision Comments at 4, 19; Charter Comments at 9-12; Comcast Comments at v, 10-13; NCTA Comments at 7, 49-53; Progress & Freedom Foundation Comments at 7-8.

is ITV's future. The Non-MVPD Owned Programming Networks have established, as supported in the economic analysis of Mr. Sidak and Dr. Singer, that ITV is not too nascent to be the focus of a Commission rulemaking proceeding, and that vertically integrated broadband distribution providers have the incentive and ability to discriminate against unaffiliated ITV content. The Non-MVPD Owned Programming Networks have established that discrimination against unaffiliated ITV content discourages investment in that content and drives competing, unaffiliated ITV distribution providers out of the market, leaving consumers with less choice at higher prices. The Non-MVPD Owned Programming Networks have established that technology-neutral nondiscrimination safeguards promote, rather than discourage, investment in broadband infrastructure and ITV content, and that creating safeguards now is consistent with FCC precedent and in the public interest. The Non-MVPD Owned Programming Networks have established that enforcement-based nondiscrimination safeguards are minimally intrusive and not overly difficult or costly to create and implement. Therefore, the Non-MVPD Owned Programming Networks have demonstrated the need for an NPRM.

In the NPRM phase of this proceeding, opponents of nondiscrimination safeguards should have the burden to demonstrate that discriminating against unaffiliated ITV content provides certain social benefits that offset its very real costs to competition and consumer choice. In that phase of this proceeding, the Non-MVPD Owned Programming Networks respectfully request that the Commission consider using nondiscrimination safeguards as the basis of an enforcement mechanism to ensure that the ITV industry will operate in a competitive manner and provide consumers with access to diverse content. Without nondiscrimination safeguards to enforce normal market behavior, the Commission will bear witness to vertically integrated broadband distribution providers with market power—whether they are cable, telecommunications or satellite operators—discriminating against unaffiliated content to advance their economic interest. Unfortunately, in this case, the economic interest of the vertically integrated broadband distribution providers to discriminate against unaffiliated content is at odds with the public interest in a competitive and vibrant ITV industry. Consumers and would-be participants in the ITV industry, however, need not suffer such anticompetitive behavior. The Commission has ample authority to craft an enforcement mechanism based on technology-neutral, nondiscrimination safeguards. Therefore, the Non-MVPD Owned Programming Networks urge the Commission to issue an NPRM to ensure openness and freedom of consumer choice for ITV.

Respectfully Submitted,

Lawrence R. Sidman

Lawrence R. Sidman
Lawrence Duncan, III
Neil Fried
VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHTD.
901 15th Street, NW
Suite 700
Washington, DC 20005

(202) 371-6206

Counsel for Non-MVPD Owned
Programming Networks

Dated: May 11, 2001